Supreme Court, U.S.
FILED

991073 DEC 23 1999

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No. _____

In The

Supreme Court of the United States

MICHAEL H. DENT,

Petitioner,

- against -

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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54pp

QUESTION PRESENTED

1. Does a federal Court of Appeals deprive an injured railroad employee of his right to a jury trial, granted to him by the Seventh Amendment to the Constitution and by Congress, and further does that Court of Appeals radically depart from accepted judicial conduct by ignoring a half-century of decisions by this Court and by ignoring the need to uniformly interpret and apply a federal statute, where the jury finds in favor of the employee in a case brought pursuant to the Federal Employers' Liability Act, the District Court agrees that there was competent evidence by which the jury could have reasonably concluded that the Railroad had been negligent and that its negligence was a cause of the employee's injuries, and where one Judge of the Court of Appeals chastised his colleagues on the court for usurping the jury's fact-finding function and, without citing any legal authority, setting aside the jury verdict, based simply on the Majority's own opinion of the evidence.

PARTIES TO THE PROCEEDINGS BELOW

The parties in the United States Court of Appeals were as follows:

Plaintiff-appellee:	Michael H. Dent
Defendant-appellant:	Consolidated Rail Corp.
Third-party defendant-appellee:	Vale Shepard
Parent and Subsidiaries:	None

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael H. Dent, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, with one Judge strenuously dissenting, is not reported. The decision in *Dent v. Consolidated Rail Corp. v. Shepard*, is noted in a table at 187 F.3d 635 (6th Cir. 1999) and can be found at 1999 WL 551402 (6th Cir. 7-20-99). (App. 1) The decision denying rehearing and/or en banc consideration is also not reported. It was filed in Appeal No. 98-3614 on September 30, 1999. (App. 31)

JURISDICTION

The Judgment of the Court of Appeals, one Judge strenuously dissenting, was entered on July 20, 1999. (App. 1) A petition for rehearing and rehearing en banc was timely filed and was denied, one Judge dissenting, on September 30, 1999. (App. 31) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The *Federal Employers' Liability Act*, 45 U.S.C. § 51 et seq., provides the remedy by which injured railroad employees can sue their employers to recover money damages when their injuries are caused by the railroad's failure to provide them with a reasonably safe place to work. It reads:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole

STATEMENT OF THE CASE

This case involves a lawsuit brought by a railroad employee (Michael Dent), against his railroad employer (Conrail), for crippling injuries and monetary damages he sustained during a grade-crossing accident in Union County, Ohio. The case was originally filed in the United States District Court for the Eastern District of Pennsylvania. It was subsequently transferred to the United States District Court for the Southern District of Ohio (Eastern Division). Jurisdiction in the district court was founded upon 45 U.S.C. § 51 et seq., specifically, 45 U.S.C. § 56.

A. The Court of Appeals Opinion

The Panel's decision actually contains three separate opinions. Judge Merritt[1] essentially held that he was negating the jury's verdict because he did not know what Conrail could have done to instruct or train Mr. Dent so that he was not injured during the grade crossing accident. This statement was curiously made even though Mr. Dent presented expert testimony to explain in detail the type of training that was necessary and that would have prevented him from being injured during the accident. No other party presented any expert witness to rebut this evidence. The existence of this evidence, which was heard by the jury, was the basis for the strenuous dissent and chastisement of the Majority's opinion.

It is most significant that Judge Merritt cited no case law in support of his opinion. Judge Merritt did not find

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[1] App. 1

that Mr. Dent's expert witness testified improperly. Judge Merritt did not find that the District Court committed any error in permitting the jury to hear Mr. Dent's expert. Judge Merritt did not distinguish or otherwise comment on the case law submitted by Mr. Dent in support of the jury's verdict and in support of District Judge Sargus' opinion denying Post Trial Motions.[2] Instead, Judge Merritt usurped and totally disregarded the jury's evaluation of the evidence and reached his conclusion based solely on his own opinion and evaluation of the factual evidence.

Judge Ryan concurred with Judge Merritt. He gave no independent reason for his concurrence.[3]

Judge Nelson dissented.[4] Judge Nelson found that the "majority" opinion ignored the standards established by the United States Supreme Court. Judge Nelson also dissented because his colleagues had ignored competent evidence that had been accepted by the jury. As Judge Nelson wrote, "The jury evidently found Dr. Bogett's testimony persuasive, and I see no basis for our second-guessing the verdict." (Slip Opinion, Nelson, dissent at 6; 1999 WL 551402, 2)

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[2] App. 7

[3] App. 6

[4] App. 4

B. The Trial Evidence

1. Conrail Knew Grade Crossing Accidents Were Likely

Michael Dent was a Conrail over-the-road locomotive engineer on May 22, 1994. His train was traveling south, from Toledo to Columbus, Ohio, at approximately 50 m.p.h. The train movement required Mr. Dent's train to travel through many grade crossings. Grade crossings were particularly dangerous places for train crews and a hazard that train crews experienced daily. Mr. Dent had been involved in five or six grade crossing collisions. While collisions did not occur daily, there was at least one near miss per trip. Many engineers experienced these traumatic accidents. Grade crossing accidents were so routine that Conrail even had a pre-printed form for completion after the grade-crossing accident.

2. Conrail Did Not Train Employees How To Behave When A Grade Crossing Accident Was Imminent

Even though grade crossing accidents were certain to occur, Conrail had no policy how its train crews should respond, and what the crewmembers should do, when faced with this frightening situation. Conrail did not provide any training to prepare them how to respond when faced with an impending grade crossing accident.

3. Mr. Dent's Grade Crossing Accident

On May 22, 1994 Mr. Dent, in accordance with railroad procedure, began blowing his horn (whistle) when his train reached the "whistle post," approximately 1500 to 1700 feet, before the Adams Road crossing, Union County, Ohio. The standard horn cadence was to be blown until the train was through the crossing. As Mr. Dent reached for the horn handle, he noticed "this red truck coming real slow up to the crossing . . . " He saw that the nose of the truck was "fouling" the track. Mr. Dent gave an additional, short burst on his horn to alert the truck driver of the train's approach. The truck continued ahead and then it suddenly stopped in the middle of the track. The wheels of the truck had straddled the track as the train was moving toward it at 50 m.p.h.

Mr. Dent and his conductor, Mr. Gilliam, speculated what the truck was doing. Mr. Dent continued blowing his horn. Suddenly, his conductor "hollered, . . . oh, my God, Mike. He has got tanks on there." Although Mr. Dent did not know what the tanks carried, he knew "if that was flammable gas, I was a dead man, and I knew that. [He] had seen too many videos and pictures of trains hitting flammable tanks to know that [he] was in really big trouble." Mr. Dent also observed tanks that looked like they contained acetylene and oxygen.

When the train was about 1,000 feet from the crossing and the truck, Mr. Dent immediately let go of the horn handle and applied the emergency brake. Mr. Dent jumped out of his seat and stood as the emergency began. He was awkwardly straddling the train's control panel and was hoping to use it to shield himself. He resumed

blowing the horn with his right hand. He stopped blowing his regular cadence and began blowing short blasts of the horn. As Mr. Dent described,

> "I was literally trying to blow him off the crossing . . . and I quit using my regular cadence, and I was doing short blasts on the horn, trying to get his attention because I didn't know what he was doing."

Mr. Dent was panicking. There was a potential for explosion. He "was scared senseless." He knew that the train would not stop in time. He believed that the train would "hit it smack dab in the middle of this tank . . . " He recalled a good friend of his who died after his train hit a hot asphalt truck when the asphalt entered the cab and burnt him. Mr. Dent's windows were also open and he feared flames and debris entering his cab.

Mr. Dent had many thoughts going through his mind. He wanted to keep warning the driver and wanted to try to get the driver's attention. He testified that he "felt a responsibility that, you know, I had to keep blowing that horn." He was "frantically blowing the horn." In this panicked state Mr. Dent was pulling on the whistle handle quicker and harder than usual. Mr. Dent also feared for his own life. He tried to figure how to get into a position of safety. The control area of the engine was small and confined, and the control panel, walls, levers, etc. encased the engineer in his seat. As Mr. Dent explained, "There is no room on this type of engine. * * * There wasn't no place for me to step to." Mr. Dent's escape was further impaired because his grip (suitcase) was blocking the one area where he might squeeze to safety. Conrail had no rules where grips should be stored

and so Mr. Dent kept it where it was conveniently located to him. Unfortunately, this location also blocked Mr. Dent's path to safety.

Mr. Dent was still standing, not certain what he would do, when he saw the driver jump out of the truck. The train was so close to the truck that Mr. Dent "thought to [himself], oh, my God, he's not going to make it." Suddenly, his hand that had been holding onto the horn handle came toward him and Mr. Dent fell to the floor. He had been pulling the horn handle so rapidly, and with such strength, that the horn handle had broken off of the lever. In 20 years as an engineer Mr. Dent had never before broken a horn handle. He fell so quickly that he didn't even have time to brace his fall with his arms. He landed on his elbow and immediately felt pain in his arm and neck. As he was lying on he floor he felt and heard the impact between his train and the truck.

4. The Expert Testimony – Conrail Should Have Trained Mr. Dent How To Behave When Faced With A Grade Crossing Emergency

Mr. Dent called William Bogett, Ph.D., as a liability expert. Dr. Bogett was an engineer with an emphasis in safety issues. He had significant experience in the design, manufacturing and engineering of locomotives, including safety concerns. His duties required him to consider the movement of railroad crews in locomotive cabs with respect to the design and manufacture of the various components in the locomotive cab.

Dr. Bogett had also studied human behavior and response with regard to locomotive cabs. He personally

observed train crews and their behavior "during my many test trips on locomotives, both observations and interviews during those times." While a passenger on the test trips he had been involved in "many near misses." These occasions gave him the opportunity to observe the behavior of the crewmembers, as they were about to strike a vehicle at the grade crossing. Dr. Bogett had investigated and analyzed grade crossing accidents and the crews' responses during them. Dr. Bogett was also a member of many professional organizations.

Dr. Bogett testified that Mr. Dent was mistaken when he said that he had a "responsibility" to keep blowing the train horn until the last possible moment. He testified that Mr. Dent should have stopped blowing his horn, and should have proceeded to a place of safety, as soon as he placed the train into emergency.[5] Dr. Bogett testified that Mr. Dent's reaction, i.e., becoming excited when faced with the fear of a collision with a truck containing flammable tanks, was normal. He testified that Mr. Dent's desire to keep blowing the horn, in an effort to protect the truck driver, was also normal. Dr. Bogett testified that the railroad should have provided training to Mr. Dent so that he would have known the proper and safe procedure to follow when a grade crossing accident was imminent. He explained that the failure to provide this training resulted in Mr. Dent behaving in a normal, but unsafe, manner. Proper training would have prepared Mr. Dent to instinctively react in the safe and proper manner. Had Mr. Dent been properly trained he would have had

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[5] Dr. Bogett testified that the engine had a built-in safety bunker. It was the alcove in the nose of the engine.

enough time to carefully move to a position of safety. Had Mr. Dent been properly trained he would not have been standing in an awkward position, while continuing to blow the horn, and he would not have placed excessive strain on the handle as his adrenaline produced the rapid and strong pulls that resulted in the handle breaking and his falling.

Dr. Bogett also testified that Conrail should have instructed Mr. Dent where his suitcase should have been stored. Without instruction, Mr. Dent naturally placed it in the most convenient position. Although convenient, this position was also unsafe because it obstructed an important pathway to the safety alcove. This obstructed pathway contributed to Mr. Dent's panic. Proper training would have prevented this obstruction, helped Mr. Dent evaluate the situation calmly, and prevented the extreme pulling of the handle causing it to break and causing him to fall.

No other party presented any witness to refute Dr. Bogett's opinions and testimony.

5. The Jury Verdict

The jury heard all of the evidence, including the testimony of Mr. Dent's expert, Dr. Bogett. They heard Dr. Bogett opine that Conrail failed to properly train Mr. Dent for foreseeable grade-crossing accidents and that if he had been properly trained he would not have been injured during this accident. Mr. Dent's claims of negligence were Conrail's failure to train Mr. Dent what to do when faced with an impending grade crossing accident,

and where to store his "grip" so that it was not an obstruction in an emergency situation. The jury rendered a verdict in favor of Mr. Dent and against Conrail. The jury found that Conrail was negligent and that its negligence was the cause, in whole or in part, of Mr. Dent's injuries.

REASONS FOR GRANTING THE WRIT

POINT I

The Court Of Appeals For The Sixth Circuit Has Rendered A Decision That Totally Disregards Important Decisions By This Court, Disregards Important Congressional Policy, Disregards The Seventh Amendment To The Constitution, And In Doing So Has So Radically Departed From Accepted Judicial Proceedings To Necessitate The Exercise Of This Court's Supervisory Power.

This Court has steadfastly held, for more than 50 years, that "The right to trial by jury is 'a basic and fundamental feature of our federal system of jurisprudence' . . . [and that] it is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act." *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353 (1943) (citations omitted). Discussing congressional policy, this Court has instructed:

> Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the

> more modern systems of workmen's compensation. But however inefficient and backward it may be, *it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." Id.* (emphasis added)

This holding, and these instructions, have often been repeated by this Court: *Blair v. Baltimore and Ohio R. Co.*, 323 U.S. 600, 602 (1945) (Noting that certiorari should be granted to protect the "important rights" that are violated when a court ignores the importance of having an injured employee's fate decided by a jury); *Dice v. Akron, Canton and Youngstown R. Co.*, 342 U.S. 359, 363 (1952) (Noting that right to a jury trial is a "substantial . . . part of the rights accorded by the Act" and recognizing that courts should not denigrate the role of the jury where there is evidence to support negligence.); *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962) (Noting, trial by jury is part of the remedy bringing into play the provisions of the Seventh Amendment and the federal policy favoring jury decisions in disputed fact questions); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988) (Noting, "the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' "); *Johnson v. Fankell*, 520 U.S. 911, n. 12 (1997) (Noting, "Congress [has] provided in FELA that the jury trial procedure was to be part of claims brought under the Act"). *See also, Norfolk and Western Ry. Co. v. Liepelt*, 444 U.S. 490, fn. 5 (1980).

This Court has also consistently held that an important purpose of the FELA "was to create uniformity

throughout the Union with respect to railroads' financial responsibility for injuries to their employees." *Norfolk and Western Ry. Co.*, 444 U.S. at n. 5. This uniformity requires that every court, anywhere in the nation, whether a federal or state court, respect the Congressional mandate that FELA cases be decided by juries and not judges. And this Court has warned,

> Cognizant of the duty to effectuate the intention of Congress to secure the right to a jury determination, *this Court is vigilant to exercise its power to review any case where it appears that the litigants have been improperly deprived of that determination." Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508-509 (1957) (emphasis added)

This vigilance is exercised where the jury is prevented from hearing the case (e.g., summary motion dismissal) or where the jury has ruled in favor of a party, there is some evidence to support the verdict, but a trial or appellate court sets aside the verdict and thus "invades the function and province of the jury." *Harrison v. Missouri Pacific R.R. Co.*, 372 U.S. 248 (1963).

In this case, as clearly explained by the one courageous dissenting Judge, the Court of Appeals majority has substituted its opinion of what it believes the result should have been for the jury's decision. As Judge Nelson wrote in his dissent:

> In the case at bar it seems to me that the testimony of plaintiff's expert witness, Dr. Bogett, can be read as justifying the following conclusions: that Conrail was negligent in failing to develop what Bogett called an 'emergency plan' for avoiding injury to locomotive crew members in the event of a grade crossing collision; that

> Conrail was negligent in failing to drill its crew members in the components of such a plan; and that Conrail's negligence played at least a slight part in producing Dent's injuries. *If I am correct in this, it follows that we are usurping a function that is not ours if we fail to affirm the judgment entered on the verdict returned by the jury.* I might not have found Dr. Bogett's testimony persuasive had I been a member of the jury; as a judge, however, I cannot say as a matter of law that his testimony was not probative."
>
> My colleagues on the panel conclude that there was no breach of any legal duty owed by Conrail to plaintiff (and thus no causal link between plaintiff's injuries and negligence on the part of the employer) because Conrail could not have offered any form of training that would have been likely to avoid the situation presented here. But, Dr. Bogett, as I have said, detailed a form of training that in his opinion would have done precisely that. *The jury evidently found Dr. Bogett's testimony persuasive, and I see no basis for our second-guessing the verdict. That being so, I respectfully dissent.* (Slip Opinion Dissent at pp. 5-6, App. #) (emphasis added)

In usurping the jury's function, and invalidating the jury decision that was based upon competent, admissible and credible evidence, the Court of Appeals deprived Mr. Dent of his right to have a jury decide his case and ignored the Congressional policy that juries, not judges, must determine the legal rights of injured railroad employees under the FELA. Further, the Court of Appeals' action deprived Mr. Dent of his rights under the Seventh Amendment.

The Court of Appeals has also ignored the congressional policy that the FELA be uniformly interpreted and applied. This Court, and courts throughout the land, honor an FELA plaintiff's right to have juries, not judges, decide their case. The Court of Appeals has now established the precedent in the Sixth Circuit that a judge can set aside a jury's verdict, even if that verdict is supported by competent and admissible evidence, simply because the court disagrees with the jury's result. FELA plaintiff's in the Sixth Circuit, and defendant-railroads too, must now proceed with the legitimate fear that the evidence they present is meaningless if a judge dislikes their case, disagrees with their theories, or for any number of other reasons decides that his or her opinion should be followed rather than the collective judgment of the citizens comprising the jury.

The precedent established by this case in the Sixth Circuit makes the right to a jury trial illusory. All parties in an FELA case, and perhaps in all civil litigation, no longer have the assurance that the time, expense and energy spent in presenting their case to the jury will not simply be wasted. This is because jury decisions in the Sixth Circuit are now only advisory.

It is essential for this Court to exercise its supervisory powers and intervene in this case. This Court should continue its historical vigilance of protecting FELA employees by actively preventing judges from usurping the role of the jury and denying FELA parties their rights under the Seventh Amendment. This Court should continue its historical vigilance of making certain that Congress' intent, that FELA cases be decided by juries and not judges, is fully effectuated.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 98-3614

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL H. DENT, Plaintiff-Appellee	)	
v.	)	
CONSOLIDATED RAIL CORPORATION, Defendant-Appellant	)	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO**
v.	)	
VALE SHEPARD, Third party defendant-Appellee	)	(Filed Jul 20, 1999)

BEFORE: MERRITT, NELSON and RYAN, Circuit Judges.

MERRITT, Circuit Judge. This is a "failure to train" case based on a theory that defendant Conrail failed to train the plaintiff engineer to deal with impending rail crossing accidents. Conrail appeals the denial of post judgment motions after a verdict the plaintiff in this action under the Federal Employer's Liability Act. Plaintiff Dent, a locomotive engineer, was injured on May 22, 1994, while in the course of employment with Conrail. He was traveling in the engine of a locomotive near a rural grade crossing in Union County, Ohio. When the train was approximately 1,500 feet from the grade crossing, Dent observed a pickup truck approaching the tracks.

Dent began to blow the train's whistle to warn the driver of the truck that the train was approaching. The truck driver continued to drive toward the tracks. The truck stalled and remained on the tracks. At this time, the conductor of the train yelled to Dent that the pickup had fuel tanks in its bed. Dent testified that the idea of colliding with the truck and the consequent possibility of an explosion caused him to panic. He also testified that he felt compelled to blow the whistle until the truck could clear the tracks. He stood up from his chair and continued to pull the whistle handle and began to look for a safe location to shield himself at impact. Dent testified that he then applied the brakes, and "threw the train into emergency." The conductor already occupied the alcove area, the safest place in the engine area in the event of a collision. Dent's suitcase, which is known as a "grip" to engineers and conductors, was on the floor obstructing his path to safety. Dent testified that he became increasingly panicked and his grip of on the whistle grew more and more tight and he pulled more and more forcefully. Shortly before impact with the truck, the driver jumped away from the truck. Then, the whistle handle broke as Dent pulled on it. Dent testified he fell to the floor and struck his suitcase and remained there until after the collision. Dent alleged the following injuries as the result of these events: inability to work since May 22, 1994, chronic pain of the upper left extremity and shoulder and upper body and chronic depression and nightmares. As a result of the accident Dent underwent extensive physical therapy and has received numerous pain blocking injections. He has also had left shoulder surgery and an acromioplasty.

The theory of plaintiff's case was that Conrail should have trained him so that he would have avoided anxiety and panic and avoided falling on his suitcase when faced with an impending rail crossing accident. A three-day jury trial commenced on February 2, 1998. On February 5, 1998, the jury returned a verdict in favor of Dent and against Conrail in the amount of $750,000. The district court denied Conrail's motion for judgment as a matter of law and its motion for new trial. This timely appeal followed.

Rail crossing accidents come in many varieties, from accidents with school buses, fuel trucks, trailer trucks, cars, farm equipment, individuals, animals and many other obstructions. In dealing with impending accidents the locomotive engineer must act with common sense in an emergency situation. In this case we see no particular form of training that Conrail should have provided that would have avoided the situation here. The plaintiff does not claim that Conrail was negligent because the whistle handle broke or because Conrail did not provide a locomotive with a safer design, cab, or driving system. He simply claims that Conrail should have trained him to avoid panic and falling after the whistle handle broke. We do not believe Conrail had a legal duty to offer training of this kind. We do not know what training Conrail could have offered that would be likely to avoid the situation here. We conclude that Conrail did not breach any legal duty that it owed to plaintiff.

Plaintiff failed to show that any employer negligence caused the injury for which he seeks compensation. The plaintiff's burden of proving causation in a FELA case is relaxed, *Summers v. Missouri Pacific Railroad System*, 132

F.3d 599, 606-07 (10th Cir. 1997), but a plaintiff must show more than a mere possibility that a causal relationship exists between a defendant's negligence and the plaintiff's injury. Evidence of causation must be composed of something beyond raw speculation. *Steveson v. CSX Transportation, Inc.*, 1996 U.S. App. LEXIS 19151 (6th Cir. 1996). Here, plaintiff was able to only offer his own conclusory, generalized testimony and the conclusory testimony of his expert that Conrail's failure to train caused his injuries.

Accordingly, the judgment of the district court is reversed and Conrail's motion for judgment as a matter of law is granted and the case remanded for entry of judgment for defendant.

DAVID A. NELSON, Circuit Judge, dissenting. In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957), the Supreme Court declared that "the test of a jury case [under the FELA] is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Although *Rogers* as decided more than 40 years ago, it is still being quoted by the Supreme Court with apparent approval. See *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994).

In the case at bar it seems to me that the testimony of the plaintiff's expert witness, Dr. Bogett, can be read as justifying with reason the following conclusions: that Conrail was negligent in failing to develop what Bogett called an "emergency plan" for avoiding injury to locomotive crew members in the event of a grade crossing

collision; that Conrail as negligent in failing to drill its crew members in the components of such a plan; and that Conrail's negligence played at least a slight part in producing plaintiff Dent's injuries. If I am correct in this, it follows that we are usurping a function that is not ours if we fail to affirm the judgment entered on the verdict returned by the jury. I myself might not have found Dr. Bogett's testimony persuasive had I been a member of the jury, as a judge, however, I cannot say as a matter of law that his testimony was not probative.

In brief summary, Dr. Bogett told the jury that railroad crossing accidents occur somewhere in the country almost daily; that it is therefore incumbent on railroad companies to develop plans for minimizing the risk of injury to locomotive crew members when such accidents occur; that crew members should be familiarized with such plans, and in this connection should be trained to repair to a place of relative safety within the cab when it becomes clear that a crossing accident is unavoidable; that crew members should be trained not to impede one another's access to the place of relative safety and not to place obstructions (suitcases, *e.g.*) in the path to safety; that the place of relative safety in the locomotive with which we are concerned here was an alcove in the front of the cab; that Mr. Dent, the engineer, should have been trained to head for the alcove as soon as he had set the emergency brake, instead of continuing to pull the whistle handle when nothing could be accomplished by doing so; and that if a proper emergency plan had been in effect – which it was not – and if Mr. Dent and the conductor had been properly trained in the components of the plan, both of the men would have got into the alcove once it

became obvious that a collision was inevitable. Had Mr. Dent reached the alcove, according to Dr. Bogett, Dent's injury could have been avoided.

My colleagues on the panel conclude that there was no breach of any legal duty owed by Conrail to the plaintiff(and thus no causal link between the plaintiff's injury and negligence on the part of the employer) because Conrail could not have offered any form of training that would have been likely to avoid the situation presented here. But Dr. Bogett, as I have said, detailed a form of training that in his opinion would have done precisely that. The jury evidently found Dr. Bogett's testimony persuasive, and I see no basis for our second-guessing the verdict. That being so, I respectfully dissent.

RYAN, Circuit Judge, concurring. I concur in the conclusion that the judgment in this case must be reversed because the defendant owed the plaintiff no duty whatever to provide any pre-collision training of the sort that would have prevented Dent's injury.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. DENT,

Plaintiff,

vs.

CONSOLIDATED RAIL CORP., et al.,

Defendants.

Cast No. C2-95-458
Judge Sargus
Magistrate Judge Kemp

OPINION AND ORDER

(Filed April 27, 1998)

This matter is before the Court on the Motion of Defendant/Third-Party Plaintiff, Consolidated Rail Corporation ("Conrail") for Judgment Notwithstanding the Verdict[1] or for a New Trial. Plaintiff, Michael H. Dent, and Third-Party Defendant, Vale Shepard, both filed memoranda in opposition to the Motion. For the reasons that follow, Conrail's Motion is denied.

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[1] The Court construes Conrail's Motion for Judgment Notwithstanding the Verdict as a motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50(a)(notes to 1991 amendments)("If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.")

I.

For purposes of the present motion, the Court provides the following abbreviated version of the testimony from trial. Notably, most of the facts of this case were never in dispute.

Plaintiff, a locomotive engineer, was injured on May 22, 1994 while in the course of his employment with Conrail. Mr. Dent was traveling in the engine of the locomotive near a rural grade crossing in Union County, Ohio. As the train came within about 1,500 feet of the grade crossing, Plaintiff observed a truck approaching the tracks. Adhering to normal procedure, Plaintiff began to blow the train's whistle so as to warn the driver of the truck that the train was approaching. The truck driver, Mr. Vale Shepard, continued to drive toward the tracks. Without explanation, the truck stalled and remained stopped on the tracks. At about the same time, the conductor of the train yelled to Plaintiff that the truck had fuel tanks on the back of it. Mr. Dent testified that the idea of a collision with the truck and the potential for an explosion caused him to panic. Dent also testified that he felt compelled to continue to blow the whistle handle until the truck could clear the tracks. He stood up from his chair, slightly off balance but still pulling the whistle handle in an attempt to avert the accident, and began to look for a position of safety. Mr. Dent testified that he applied the brakes, and "threw the train into emergency." The conductor blocked the alcove area; Mr. Dent's suitcase (also known as a "grip") was on the floor obstructing a path to safety. Mr. Dent became increasingly panicked and concerned for himself and the truck driver. His grip on the whistle grew tighter and more forceful as he

continued to try to warn the driver. The truck driver finally jumped out of the truck. Then, the whistle handle broke as Mr. Dent was pulling on it. He fell to the floor, striking his suitcase, and remained there until after the collision, with the broken whistle handle still clenched in his fist.

While Plaintiff certainly could not have known it at the time, the undisputed testimony at trial made clear that the tanks on the back of Vale Shepard's truck contained less than two (2) gallons of gasoline. Mr. Shepard had borrowed the standard-transmission truck from his employer for a weekend day. Mr. Shepard testified that he did not stop first before entering the railroad grade crossing. Mr. Shepard testified that had enough time to cross the tracks when he first saw the train approaching,[2] but that his truck stalled unexpectedly directly over the tracks. He testified that he was very familiar with standard-transmission trucks, and that on countless occasions he had driven the truck involved in the accident, or one identical to it, which was also owned by his employer.

This matter was tried to a jury beginning on February 2, 1998. Following several days of testimony, the jury returned a verdict on February 5, 1998 in favor of Mr. Dent, and against Conrail. The verdict against Conrail was entered solely on Plaintiff's Federal Employer's Liability Act, 45 U.S.C., § 51-60 ("FELA").[3] In the matter of

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[2] The testimony at trial indicated that the train was between 1,500 and 1,800 feet away from the crossing when Mr. Shepard first saw it.

[3] Plaintiff also asserted a claim for a violation of the Locomotive Boiler Inspection Act, 45 U.S.C. § 22-43 ("BIA").

the third-party complaint, the jury returned a unanimous verdict in favor of Vale Shepard, and, again, against Conrail.

II.

Pursuant to Fed. R. Civ. P. 50(a),[4] Conrail has moved the Court for judgment notwithstanding the verdict (now known as "judgment as a matter of law") as to the claim of Plaintiff, Michael Dent, and as to the third-party claim by Conrail against Vale Shepard. In the alternative, Conrail seeks a new trial under Fed. R. Civ. P. 59.[5]

Plaintiff asserted that Conrail violated the BIA by failing to provide a whistle/horn handle in proper condition and safe for operation. The jury found no liability under the BIA and returned a verdict in favor of Conrail on this issue.

[4] The rule provides in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. Rule 50(a)(1).

[5] Rule 59(a) provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . .

Fed. R. Civ. P. 59(a).

Unless otherwise prescribed by law, a district court may grant a motion for judgment as a matter of law if "there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable persons could differ." *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir.1991) (citation omitted). Without weighing the evidence or judging the credibility of witnesses, and drawing all inferences in favor of the non-moving party, a district court usually undertakes to determine whether there is sufficient evidence to permit reasonable jurors to find for the non-moving party. *Cook v. American Steamship Co.*, 53 F.3d 733, 740 (6th Cir.1995) (citation omitted).

A different standard applies, however, in FELA cases. The operative language of 45 U.S.C. § 51 provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .

45 U.S.C. § 51. The Supreme Court has held that a jury question is created in a FELA case if:

> the proofs justify with reason the conclusion that *employer negligence played any part, even the slightest,* in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single

> inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506-07 (1957) (footnotes omitted) (emphasis added); *see also Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806-07 (6th Cir.1985)(*quoting Rogers*). The Sixth Circuit has followed the Supreme Court in granting great deference to the jury's verdict in matters involving the FELA, noting that the deference given to the jury's interpretation of the facts is even greater in FELA cases. *Clark v. Kentucky & Indiana Term, R.R.*, 728 F.2d 307, 310 (6th Cir.1984); *Cybula v. Detroit & Mackinac Ry. Co.*, 1991 WL 41526 (6th Cir.1991) (unpublished opinion) (citations omitted). Thus, in ruling on a motion for judgment as a matter of law, the Court will defer to the fact-finder's decision so long as it is possible, based on the evidence, to attribute the result to the employer's negligence. This standard applies even if other possible causes exist or contributed to the injury. *See Rogers*, 352 U.S. at 506.

Therefore, in the instant matter with respect to Plaintiff's FELA case, the Court must look only at the evidence and, drawing all reasonable inferences in favor of the Plaintiff (as the non-moving party), determine if the evidence is sufficient to support a finding for the Plaintiff.

III.

A. Conrail's Motion with Respect to Plaintiff

Conrail asserts that the judgment for the Plaintiff is unsupported by the evidence. In sum, Conrail maintains that Plaintiff's FELA claim was presented to the jury

under two potential theories of liability: (1) that Conrail was negligent in failing to train Plaintiff in proper emergency procedures; and/or (2) Conrail was negligent in failing to provide a luggage storage compartment.

Conrail asserts, however, that the testimony at trial established only that Plaintiff's injuries occurred because of the broken horn handle and that he had no opportunity to take any action for his own protection.[6] According to Conrail, Plaintiff's fall as it actually occurred rendered the other possible bases for liability moot. On Conrail's theory, even if Plaintiff had been trained in emergency procedures (assuming that such duty to train existed and that it was breached), or if the luggage had been better stored, Plaintiff's injuries were the result of a fall that would have occurred regardless of these other contingencies. Moreover, Conrail contends that Plaintiff offered no empirical evidence of the efficacy of the proposed training, but instead presented only the conclusory assurance of his expert that the training would have prevented the injury. Conrail asserts that Plaintiff failed to show that his reaction would have been different had he been trained as suggested, or that the training would have changed the outcome. Finally, Conrail contends that it could not have foreseen that the lack of a luggage rack would have caused Plaintiff's injury, and thus, Plaintiff failed to prove proximate cause.

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[6] Conrail asserts that the failure of the jury to find liability under the Locomotive Boiler Inspection Act ("BIA") conclusively establishes that Plaintiff failed to prove any defect in the locomotive equipment, including the horn handle.

Plaintiff did not construct his theory of the case as narrowly as Conrail has portrayed it. Indeed, Plaintiff asserts that the evidence at trial overwhelmingly demonstrated that the extreme use of and stress upon the whistle handle was the result, at least in part, of Conrail's negligence, and that this negligence caused the handle to break. Specifically, Plaintiff argues that the evidence adduced at trial demonstrated that Conrail's negligence, including the failure to develop an emergency response plan and to train its employees in it, was a cause, at least in part, of Plaintiff's injuries. Likewise, Plaintiff maintains that the failure to designate a specified luggage storage area, whether as part of an emergency response plan or independently, caused Plaintiff, at least in part, to remain in an unsafe position and to exert severe stress on the whistle handle.

Given the applicable standards in an FELA case, this Court concludes that a jury could find within reason that Conrail's negligence was responsible, at least in part, in producing the injury for which Plaintiff sought damages. Although Conrail presents an alternate theory,[7] it does

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[7] Conrail argues that Plaintiff offered no empirical evidence of the efficacy of the proposed training, but instead presented only Dr. Bogget's "conclusory assurance" that training would have prevented the injury. Conrail, however, misinterprets Plaintiff's burden. Plaintiff need not set out the exact parameters of a proposed plan, and then demonstrate that he would not have been injured under it. Instead, Plaintiff needed to show, and in fact did demonstrate to the satisfaction of the jury, that his injury was caused in whole or in part from Conrail's negligence. The jury apparently perceived negligence in Conrail's failure to train its employee how to handle grade crossing emergencies A reasonable jury could have concluded

not matter that the jury could have also attributed Plaintiff's injuries to other causes. *See Rogers*, 352 U.S. at 506.

Plaintiff presented proof that he feared a collision with Vale Shepard's truck which had stalled on the tracks, and feared that he would be seriously injured or killed in the accident. Plaintiff testified that he stood up from his seat and leaned slightly to his left while still exerting pressure on the whistle handle. Plaintiff's sworn testimony revealed that during the emergency he tried to figure out where and how to shield himself from the danger he was anticipating. At the same time, he remained extremely concerned about blowing the whistle to warn the driver. Plaintiff testified that his luggage blocked a potential path to a safe place on the locomotive. Plaintiff presented evidence that grade crossing accidents and potential collisions at crossings occur with some frequency. Plaintiff's expert, Dr. William Bogget testified that Conrail should have developed a plan and trained its employees how to respond at grade crossings emergencies. In other words, Plaintiff produced evidence from which a jury could reasonably conclude that Conrail's negligence played a part in producing his injuries.

Conrail asserts that it is entitled to judgment as a matter of law regarding Plaintiff's theory of liability involving the location of the luggage. Conrail mischaracterizes Plaintiff's claim as an allegation that "Conrail was

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that this, at least in part, resulted in Plaintiff continuing to work the whistle handle (which could have been placed in an automatic, activated mode with the same result as continuous pulling) instead of moving to a safety position.

negligent in failing to provide a luggage storage compartment."

Dr. Bogget, in fact, did testify regarding the need for Conrail to assign a specific location for the placement of luggage. Conrail asserts, however, that it could not reasonably have foreseen that the lack of a luggage rack would have created a hazard. Conrail cites *McGinn v. Burlington R.R. Co.*, 102 F.3d 295 (7th Cir. 1996). In *McGinn*, the Court of Appeals for the Seventh Circuit held that a crew member's act of tripping over his own suitcase in engine cab did not support liability against railroad under the FELA because the plaintiff therein failed to offer any evidence that his employer had a duty to install luggage racks or that it breached this duty.

Conrail's reliance on *McGinn*, however, is misplaced. There, the railroad employee sought compensation under the FELA and the BIA for failure of his employer to install a luggage rack. In the case at bar, Plaintiff does not fault Conrail for failure to have a luggage rack, but instead for failure to have any emergency plan at all, including one which would encompass the proper location for the crew's luggage, in cases of grade crossing emergencies.

The Court of course does not determine the precise bases of the jury's verdict. Instead, this Court concludes only that the evidence adduced at trial justifies within reason the jury's conclusion that negligence of Conrail played a part in the Plaintiff's injury.

B. Conrail's Motion with Respect to Third-Party Defendant

Conrail maintains that the Court erred in failing to direct a verdict against Vale Shepard on the third-party claim.[8] Conrail's theory is that Vale Shepard violated Ohio Rev. Code § 4511.63 because he did not stop at the

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[8] In its Motion, Conrail merely asserted that the Court "erred in failing to direct a verdict against Vale Shepard on Conrail's third-party claim." (Motion, at p. 7.) To the extent that Conrail seeks to have this Court consider once more its decision to present the issue to the jury, the Court declines to do so. The bases for the Court's decision are set forth in the record, and Conrail has presented no new argument which it did not previously raise at trial so as to persuade this court to reconsider its original ruling. Instead, Conrail's Motion will be construed as one renewing its previous motion to judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), which provides in pertinent part:

> (b) If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
>
> (1) If a verdict was returned:
>
> (A) allow the judgment to stand,
>
> (B) order a new trial, or
>
> (C) direct entry of judgment as a matter of law;

railroad tracks, but instead shifted gears, while at the same time carrying gasoline as a cargo.

Vale Shepard counters that the cited statute applied only if the vehicle was "carrying . . . flammable liquids *as a cargo* or as such part of a cargo as to constitute a hazard." Ohio Rev. Code § 4511 (emphasis added). Mr. Shepard contends that Ohio Rev. Code § 4511.63 applies only to vehicles that are, in fact, transporting fuel as cargo – not simply to vehicles capable of carrying flammable liquids as cargo. Mr. Shepard argues that the evidence indisputably established that his vehicle was carrying no more than two gallons of gasoline at the time of the collision. Vale Shepard contends that the Court properly submitted the question of whether the vehicle was carrying a flammable liquid as "cargo" for the jury's consideration, and, according to its verdict, that the jury obviously concluded that Mr. Shepard was not carrying the two gallons of gasoline as "cargo."

Conrail's Motion with respect to Vale Shepard is not well-taken.[9] Without weighing the evidence or judging the credibility of witnesses, and drawing all inferences in favor of Vale Shepard, as the non-moving party, the court

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[9] Conrail's claim against Vale Shepard arose as contribution and/or indemnification in the context of pure negligence and negligence per se. In other words, the relaxed standard by which the Court reviewed Conrail's Motion with respect to the Plaintiff under the FELA does not apply as against Vale Shepard. Instead, the Court will grant Conrail's Motion for judgment as a matter of law only if "there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable persons could differ." *Macnad v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir.1991) (citation omitted).

determines that there was sufficient evidence to permit reasonable jurors to find for Mr. Shepard. *See Cook v. American Steamship Co.*, 53 F.3d 733, 740 (6th Cir.1995). The statute, Ohio Rev. Code § 4511.63, applies only to vehicles that are carrying flammable liquids as cargo or as such part of a cargo to constitute a hazard. The statute does not define the amount of fuel that constitutes a "cargo." The testimony adduced at trial established that the gasoline present in the tanks on the back of Mr. Shepard's vehicle were nearly empty and contained no more than two gallons of gasoline. In the absence of statutory definition of the term "cargo," it was within the province of the jury to determine whether two gallons of gasoline constitute a cargo for purposes of the statute. The verdict reflects the fact that the jurors determined that two gallons do not represent a cargo, and therefore, Mr. Shepard had no statutory obligation to stop at the railroad tracks before crossing them as set forth in Ohio Rev. Code § 4511.63.

IV.

The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 of the Federal Rules of Civil Procedure. Pursuant to that Rule, a new trial may be granted "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed.R.Civ.P. 59(a). Generally courts have interpreted this language to mean that a new trial is warranted when a jury has reached a "seriously erroneous result" as evidenced by: (1) the verdict being against the weight of the evidence;

(2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias. *Holmes v. City of Massillon, Ohio,* 78 F.3d 1041, 1045-46 (6th Cir. 1996). When a district court determines that a verdict is against the weight of the evidence, that court has a duty to grant a new trial in order to prevent a miscarriage of justice. *Duncan v. Duncan,* 377 F.2d 49, 52 (6th Cir.), *cert. denied,* 389 U.S. 913(1967). Accordingly, this Circuit has determined that a jury's verdict should not be overturned as being against the weight of the evidence unless that verdict was unreasonable. See *Duncan,* 377 F.2d at 52; *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.,* 936 F.2d 1474, 1487 (6th Cir.1991).

Conrail asserts the same argument in support of its Motion for a New Trial as in its Motion for Judgment Notwithstanding the Verdict. The Court finds that none of the grounds for granting such motion under *Holmes* is present in this case. The Court declines to grant a new trial.

V.

For the foregoing reasons, Defendant's Motion for New Trial or Judgment Notwithstanding the Verdict (Doc. 89) is **DENIED.**

IT IS SO ORDERED.

/s/ Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

9-27-98
DATED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Eastern Division

MICHAEL H. DENT,

vs.

CONSOLIDATED RAIL CORP.,

vs.

VALE SHEPARD

JUDGMENT IN A CIVIL CASE

(Filed Feb. 6, 1998)

CASE NUMBER: C2-95-458
Judge Edmund A. Sargus, Jr. Magistrate Judge Terence P. Kemp

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the January 5, 1998 JURY VERDICT for Plaintiff, Michael Dent, and for Third-Party Defendant, Vale Shepard, this case is now hereby TERMINATED.

Date: January 6, 1998

KENNETH J. MURPHY, CLERK
/s/ Andy F. Quisumbing
(By) Andy F. Quisumbing
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. DENT,

Plaintiff,

v.

CONSOLIDATED RAIL CORP.,

Defendant/Third-Party Plaintiff,

v.

VALE SHEPARD,

Third-Party Defendant.

Case No. C2-95-458
Judge Sargus
Magistrate Judge Kemp

(Filed Feb 5, 1998)

VERDICT form 1

In Plaintiff Dent's claim against Conrail,

We the jury herein do find:

[X] For Plaintiff, Michael Dent

OR

[ ] For Defendant Conrail

Your decision must be unanimous. All eight jurors must signify their answer by signing their names below in ink:

/s/ Illegible
Foreperson

/s/ Eric R. Hayes
/s/ Tony L. Libby
/s/ Beth A. Barker
/s/ Kerry J. Mason
/s/ Felicia G. Sauder
/s/ Illegible
/s/ Illegible

Date: 5 Feb 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. DENT,

Plaintiff,

v.

CONSOLIDATED RAIL CORP.,

Defendant/Third-Party Plaintiff,

v.

VALE SHEPARD,

Third-Party Defendant.

Case No. C2-95-458
Judge Sargus
Magistrate Judge Kemp

(Filed Feb 5, 1998)

VERDICT form 2

Complete this verdict form only if you found for plaintiff Dent against defendant Conrail on Verdict form 1.

In Defendant Conrail's claim against Third-Party Defendant Vale Shepard,

We the jury herein do find:

[ ] For Defendant Conrail

OR

[X] For Third-Party Defendant Vale Shepard

Your decision must be unanimous. All eight jurors must signify their answer by signing their names below in ink:

/s/ Illegible
Foreperson

/s/ Philip Illegible

/s/ Illegible

/s/ Beth A. Barker

/s/ Eric R. Hayes

/s/ Kerry J. Mason

/s/ Terry L. Libby

/s/ Felicia G. Sauder

Date: 5 Feb 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. DENT,

Plaintiff,

v.

CONSOLIDATED RAIL CORP.,

Defendant/Third-Party Plaintiff,

v.

VALE SHEPARD,

Third-Party Defendant.

Case No. C2-95-458
Judge Sargus
Magistrate Judge Kemp

(Filed Feb 5, 1998)

SPECIAL JURY INTERROGATORIES
BOILER INSPECTION ACT

LIABILITY

1. Do you find that defendant Conrail violated the Federal Boiler Inspection Act by not providing the plaintiff with a whistle/horn handle which was in proper condition and safe for operation?

[ ] Yes

[X] No

If your answer is yes, please go on to Question 2.

If your answer is no, please go on to Question 3.

2. Do you find that the plaintiff's injuries were caused, in whole or in part, by this violation of the Federal Boiler Inspection Act?

[ ] Yes

[ ] No

If your answer is yes or no, please to on to Question 3.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. DENT,

Plaintiff,

v.

CONSOLIDATED RAIL CORP.,

Defendant/Third-Party Plaintiff,

v.

VALE SHEPARD,

Third-Party Defendant.

Case No. C2-95-458
Judge Sargus
Magistrate Judge Kemp

(Filed Feb 5, 1998)

SPECIAL JURY INTERROGATORIES
BOILER INSPECTION ACT

LIABILITY

1. Do you find that defendant Conrail violated the Federal Boiler Inspection Act by not providing the plaintiff with a whistle/horn handle which was in proper condition and safe for operation?

[ ] Yes

[X] No

If your answer is yes, please go on to Question 2.

If your answer is no, please go on to Question 3.

2. Do you find that the plaintiff's injuries were caused, in whole or in party, by this violation of the Federal Boiler Inspection Act?

[ ] Yes

[ ] No

If your answer is yes or no, please to on to Question 3.

FEDERAL EMPLOYER'S LIABILITY ACT

LIABILITY

3. Do you find that the plaintiff, Mr. Dent, has established by a preponderance of evidence the elements of his claim of negligence against defendant Conrail, under the Federal Employer's Liability Act, and that such violation

played any part, no matter how slight, in bringing about an injury to the plaintiff?

[X] Yes

[ ] No

If you have answered yes, please to on to Question 4.

If you have answered no, please notify the Marshal of your verdict.

4. If you find that the plaintiff is entitled to recover against Conrail for negligence, do you find that the defendant has established by a preponderance of the evidence its claim that plaintiff Dent was himself negligent, under the Federal Employer's Liability Act, and that such negligence played any part, no matter how slight, in bringing about his injuries?

[ ] Yes

[X] No

If you answered yes, please go to Question 5.

If you answered no, please go on to Question 6.

5. If your answer to Question 4 is yes, stated in a percentage, how much did each of the parties negligence contribute to bringing about the injury? (This sum must add up to 100%)

[ ]% Plaintiff Dent

[ ]% Defendant Conrail

Total 100%

DAMAGES

6. Do you find that the plaintiff is entitled to recover damages for:

(a) Loss of earnings? [X] Yes [ ] No

(b) If yes, in what amount? $642,000.00

(c) Pain and suffering from the date of the accident to the date taking into account the nature and extent of the injuries?
[X] Yes [ ] No

(d) If yes, in what amount $108,000.00

(e) Future pain and suffering?
[ ] Yes [X] No

(f) If yes, in what amount? $_____

(g) What is the total amount of damages? $750,000.00

[Total of any amounts in (b), (d) and (f).]

(Do not complete the following question unless your verdict is for Michael Dent against Conrail.)

7. Do you find that Vale Shepard was negligent?

[ ] Yes

[X] No

If you answered yes, please go on to Question 8.

If you answered no, please notify the Marshal of your verdict.

8. Do you find that Vale Shepard negligence was a proximate cause of the injuries suffered by Michael Dent?

[ ] Yes

[X] No

If you answered yes, please to on to Question 9.

If you answered no, please notify the Marshal of your verdict.

9. If your answer to the preceding question was yes, stated in a percentage, how much did Conrail and Vale Shepard contribute to the injuries suffered by Michael Dent? (This sum must add up to 100%)

[ ]% Defendant Conrail

[ ]% Third-Party Defendant Conrail

Total 100%

98-3614

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL H. DENT,	)	
Plaintiff-Appellee,	)	
v.	)	
CONSOLIDATED RAIL CORPORATION,	)	**ORDER**
Defendant-Appellant,	)	**(Filed Sep. 30, 1999)**
v.	)	
VALE SHEPARD,	)	
Third Party Defendant-Appellee.	)	

BEFORE: MERRITT, NELSON, and RYAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

denied. Judge Nelson would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk illegible

Supreme Court, U.S.
FILED
JAN 27 2000
CLERK

No. 99-1073

In The

Supreme Court of the United States

MICHAEL DENT,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent restates the Questions Presented as follows:

1. Should this Court decline to grant certiorari to review a claimed question of law in a case where the Petitioner failed to present adequate evidence supporting his liability theory and the theory of liability assumed a duty involving an unlawful act?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

All of the parties to the proceeding are named in the caption. The parent companies of Consoildated Rail Corporation are Conrail, Inc., which is the 100% owner of Consolidated Rail Corporation; Green Acquisition Corporation, which is the 100% owner of Conrail, Inc.; and CRR Holdings LLC, which is the 100% owner of Green Acquisition Corporation. Norfolk Southern Corporation and CSX Corporation each own 50% of the stock of CRR Holdings LLC. The non-wholly owned subsidiaries of Consolidated Rail Corporation are LMS Partnership (50%) and Indiana Harbor Belt R.R. Company (51%).

I. STATEMENT OF CASE

This action was brought under the Federal Employer's Liability Act (FELA). The case was tried in the federal district court in Columbus, Ohio.

After an adverse jury verdict on petitioner's single "failure to train" theory of liability, and the denial of respondent's Rule 50 motion for judgment as a matter of law, Conrail appealed. The U.S. Court of Appeals for the Sixth Circuit reversed, granted Conrail's post-judgment motion as a matter of law, and remanded for entry of judgment in favor of respondent.

Petitioner, Michael Dent, now seeks review of the Sixth Circuit's determination that his evidence had failed, as a matter of law, to show that Conrail breached a duty owed to him, or that any breach caused the injury for which he sought compensation.

II. SUMMARY OF ARGUMENT

Dent's failure to present a legally sufficient evidentiary basis for his claims was the result of his decision to sue his employer instead of the third-party wrongdoer who caused the accident.

III. REASONS FOR DENYING THE WRIT

The Petition, Which Seeks To Have The Court Reverse The Judgment Of The Court Of Appeals, Should Be Denied Because Plaintiff Failed To Present Sufficient Evidence Supporting His Liability Theory And That Liability Theory Assumed A Duty Involving An Unlawful Act.

Petitioner's description of the accident is substantially accurate. However, it lacks an explanation of why the "red truck . . . stopped in the middle of the track."

Vale Shepard borrowed his employer's red pickup truck and equipment trailer to work at home over a weekend. Subsequently, the truck stalled when he shifted

gears on a rural railroad crossing in front of Conrail's approaching train. Shepard saw the train coming, assumed he had time to cross the tracks, but downshifted from fourth to third gear at too low a speed and the truck stalled. Unable to get the truck restarted in time, Shepard exited the truck just before the crash.

Michael Dent was Conrail's engineer, lawfully operating the locomotive that hit Shepard's pickup truck. Dent claimed he was injured when the horn handle broke and he fell (or dove) to the floor seconds before the collision, landing on his grip.

Dent, assuming apparently that an FELA claim against his employer-railroad had the higher dollar potential, sued only the railroad for his alleged injury, and ignored the straightforward claim against Shepard, whose negligence he admitted[1] was the cause of the accident. Dent's refusal to join Shepard in the action resulted in the peculiar procedural posture of the case on appeal.

Because Conrail's conduct did not cause the accident, the petitioner's case went to the jury on two novel theories of liability. First, Dent claimed Conrail had violated the Boiler Inspection Act (BIA) by not providing a horn handle in the locomotive which was in proper condition and safe for operation, *i.e.*, would not break when Dent pulled on it too hard. Dent's second theory was that the railroad should have trained him to avoid anxiety and panic when faced with an impending crossing accident. He claimed that such training would have prevented him from pulling too hard on the horn, and he would have abandoned the horn and moved cautiously to a place of safety.

Only the second of these theories of liability was the subject of respondent's appeal. The BIA issue was resolved by a special interrogatory to the jury that was answered in the negative, finding no BIA violation. The

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[1] Record Vol. I, Page 123, Lines 13-17.

jury's verdict was entered against Conrail solely on the "failure to train" issue.

Accordingly, the respondent's Rule 50 motion for judgment as a matter of law was limited to the issue of Conrail's alleged negligence for "failure to train" Dent to avoid panic and anxiety.

Conrail claimed in its motion for judgment that it was an innocent party in this accident and that no legally sufficient evidence had been introduced by Dent to show the railroad was negligent or that the conduct of the railroad caused Dent's injury, in whole or in part.

The motion was denied by the trial court. An appeal to the Sixth Circuit followed, with respondent seeking a "de novo" review of the trial court's denial of the motion for judgment.

The circuit court, reviewing the questions of law and fact as though it was the trial court, correctly determined that the plaintiff had failed to show Conrail was negligent or that Conrail's negligence caused the injury for which Dent sought compensation.

Dent's expert, Dr. Bogett, was the sole witness called in support of the "failure to train" issue. Petitioner has presented the substance of Bogett's conclusory opinions on pages 9-10 of the petition.

Bogett was allowed to opine that Dent was "mistaken" about having a "responsibility"[2] to keep blowing the train horn; that Dent should have stopped blowing the horn and "carefully moved to a position of safety"[3] after setting the emergency brake. With proper training, according to Bogett, Dent would have abandoned the horn instead of behaving "normal"[4] and continue blowing until Shepard exited the stalled truck.

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[2] Pet. 9.

[3] Pet. 10.

[4] Pet. 10.

Bogett's opinions, in addition to being "raw speculation" and "conclusory,"[5] suffered from another fatal flaw: What Bogett proposed Conrail should have trained Dent to do was prohibited by law. Ohio's train horn statute required that the train's horn be sounded up to and **through each crossing.**

> "When an engine in motion and approaching a turnpike, highway or street crossing . . . the engineer of such engine shall sound such whistle at a distance of at least 80 and not farther than 100 rods from such crossing and ring such bell **continuously until the engine passes the crossing.**" (Emphasis added) *Ohio Revised Code* Section 4955.32.

Section 4955.34 of the Ohio Revised Code provided that "every engineer . . . in charge of an engine who fails to comply with section 4955.32" is personally liable for a civil penalty, and the employer of such engineer is strictly liable in damages for injury or damage caused by the engineer's failure to comply with the horn statute. Given the foregoing provisions, it is not surprising that Bogett had to admit that no railroad in the United States had ever adopted his recommendation.[6]

Not only was Bogett's recommendation for training Dent in conflict with state law, it also conflicted with Dent's testimony about the "rules" requiring him to blow the horn until the locomotive occupies the crossing[7] Bogett's testimony also conflicted with Dent's explanation of how he was injured. While Bogett said his injury was caused by not knowing what to do, Dent had testified

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[5] Pet. App. 4.

[6] Record, Vol. II, Page 31, Lines 15-21 (App. 3).

[7] Record, Vol. I, Page 59, Lines 5-9 (App. 2).

he went to the floor because the "whistle handle broke off."[8]

IV. CONCLUSION

This case has no constitutional dimensions. The outcome was ordained when petitioner elected to file an FELA action against his employer rather than a state BI claim against the tortfeasor who was the cause of the accident. The petition should be denied.

Respectfully submitted,

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[8] Record, Vol. I, Page 123, Lines 21-22, Page 124, Lines 19-22 (App. 2).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. DENT,	:	
PLAINTIFF,	:	
VS.	:	
CONSOLIDATED RAIL CORPORATION,	:	CASE NO. C-2-95-458
DEFENDANT/THIRD-PARTY PLAINTIFF,	:	
VS.	:	
COUNTRYSIDE COMPANIES, INC. DBA COUNTRYSIDE CONSTRUCTION, ET AL.,	:	
THIRD-PARTY DEFENDANTS.	:	

EXCERPTS OF PROCEEDINGS

BEFORE THE HONORABLE EDMUND A. SARGUS, JR., UNITED STATES DISTRICT JUDGE, SITTING AT COLUMBUS, OHIO, FROM FEBRUARY 2, 1998, TO FEBRUARY 5, 1998.

APPEARANCES:

MICHAEL J. OLLEY, ESQ.

ON BEHALF OF THE PLAINTIFF.

PHILIP E. HOWES, ESQ., AND JOSEPH V. ERWIN, ESQ.

ON BEHALF OF THE DEFENDANT/THIRD-PARTY PLAINTIFF, WILLIAM J. CHRISTENSEN, ESQ.,

ON BEHALF OF THE THIRD-PARTY DEFENDANT.

* * *

Record, Vol. I, Page 59, Lines 5-9.

A. We have got rules, there is a cadence that an engineer has got to follows, and it's two longs, a short and a long; and you have to do that cadence until you're through the crossing, until you've occupied the road crossing.

* * *

Record, Vol. I, Page 123, Lines 13-17.

Q: As you sit here today, are you persuaded that the entire cause of the accident, i.e. your hitting the truck, was the result of Mr. Shepard pulling onto the crossing and stalling in front of you?

A. Yes.

* * *

Record, Vol. I, Page 123, Lines 21-22,
Page 124, Lines 19-22.

A. No. The reason why I took a dive to the floor was the whistle handle broke off.

Q. That you were pulling on the whistle handle so hard with your right hand that when the whistle handle let go, you went down?

A. Correct.

* * *

Vol. II, Page 31, Lines 15-21.

Q. You indicated that you had made recommendations to the railroad community regarding training of crews to go to that position, did you not?

A. Yes.

Q. Do you know if any part of that railroad community adopted your recommendations?

A. I don't know. I doubt it from what I've seen.

* * *